On Judging Judges

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Judges are not, as many believe, impartial umpires who hand down decisions in accordance with clear and unwavering rules. This view of the judge as an invisible interpreter of the law, as a part of the courtroom with no more individual personality than a witness chair or a jury box, is a fiction that judges themselves have done much to perpetrate.

The reality is that judges are enormously potent public servants who usually have a broad range of options in any given instance: they may allow or disallow a contested piece of evidence; they set bail and revoke it; they pronounce final judgment in non-jury trials; they establish a trial's ground rules in their decisions on motions; they circumscribe and guide the verdicts of juries with their charges; and—most demanding and fateful of all—they select the appropriate punishment for convicted criminals. And these are only the most obvious illustrations of judicial authority. A judge may influence the course of justice in a dozen subtler ways—with an eyebrow raised in skepticism, a tone harsh or gentle, a pointed question, or a disparaging comment.

A judge's character and personality are vital variables in every decision he makes. His own experience is the frame of reference he brings to the judgment of his peers. Judges are no more and no less than human, struggling with their own imperfections and those of others, and their human reactions have as profound an influence on their decisions as the law they are sworn to serve. "Men's judgments are a parcel of their fortunes," Shakespeare wrote, "and things outward do draw the inward quality after them, to suffer all alike." The quality of our justice is a direct reflection of the quality—and qualities—of our judges.[1]

I believe it is probably beyond serious dispute that confidence in our judicial system is based in turn on confidence in the independence of our judiciary. It assumes that the judge or judges hearing a dispute or appeal will not be prejudiced by knowing one of the litigants or witnesses or that they will not identify with the cause being forwarded or the ideas espoused by litigants. It assumes a judge's former association with counsel for one or more of the litigants will not color the consideration of the merits of each litigant's position. Assumptions to the contrary notwithstanding, how can one really tell if the judge is independent, if the judge was a former partner or associate of one of the counsel of record, if counsel for one of the parties was a former judge on the court, a former law clerk, bailiff or other court employee or otherwise has

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[1] DONALD D. JACKSON, JUDGES vii–viii (1974).

some connection or identification with the judge which can or may give rise to questions about the impartiality of the trier of fact?

The judiciary does not have an army to enforce its decisions and orders. The United States marshal or county sheriff serves court orders and brings before the courts persons who may have failed or neglected to obey the requirements of a court's order. Throughout the history of our nation, courts have relied upon the underlying confidence of the public in the fairness and impartiality of the judicial system to obey court orders without being coerced. In turn, the sense of public confidence rests on a bedrock of belief in the trustworthiness of judges as fair and impartial persons whose devotion goes to ascertaining the truth and seeing to fair dealing throughout the judicial process at every level. Thus, I think it is fair to say that our courts as an institution depend on continued public confidence in the fairness and impartiality of those courts.

This public confidence, in turn, depends upon a continuing public belief in the reliability of referees, magistrates, justices of the peace, judges and justices as fair and impartial arbiters who are not and cannot be swayed by extra-judicial influences such as old friendships, adverse public reaction or the like. In some circles there also exists a virtual requirement that courts' decisions and processes be beyond public criticism so long as they are or appear to be fair and impartial.[2] That notion has been the subject of continuing analysis and debate. Indeed, former Chief Justice Warren E. Burger, while a Circuit Court of Appeals Judge, stated in an address to the Ohio Judicial Conference that "[i]n a country like ours, no public institution, or the people who operate it, can be above public debate."[3]

The inescapable conclusion may be that courts as institutions are no better (stronger?) than the judicial officers who are in charge of them from time to time. We generally rely upon judicial officers themselves to know when contact with the parties or the subject matter of a dispute may be so close as to require recusal in favor of another with less close association to the parties or the subject of the dispute.[4]

In 1974, Congress clarified the standards for judicial self-disqualification in the federal system.[5] The statute, along with 28 U.S.C. § 144, dealing with disqualification of a judicial officer for bias or prejudice, form the heart of what

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[2] *See, e.g.*, Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

[3] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 5 (1979).

[4] Once a judge has recused, it is error to again accept the case. Easter v. Jeep Corp., 750 F.2d 520, 524 (6th Cir. 1984).

[5] 28 U.S.C. § 455 (1988). To review the 1974 amendments, see Pub. L. No. 93-512, § 1; 88 Stat. 1609 (1974).

Congress felt was to be a codified system for dealing with questions of judicial bias, prejudice or the perception thereof.[6] For nearly twenty years, the application of section 455 has been a source of continuing debate. In its 1993–94 term, the United States Supreme Court resolved that debate, holding that judicial decisions alone will almost never provide a basis for motions to recuse or disqualify and that decisions formed on the basis of courtroom events will, absent demonstrated antagonism or favoritism, generally not support challenges to the fairness and impartiality of court processes.[7]

Many states also have procedures in place for dealing with real or perceived bias or prejudice of judges.[8] In each instance, the policy consideration is undoubtedly to provide an avenue for resolving beliefs or perceptions of bias or prejudice and further strengthening the public perception of overall fairness in the judicial system. In the final analysis, I suggest the most reliable standard is what is in an individual judge's heart and mind. Efforts at judge shopping are almost universally met with disdain and the effort of litigants, their counsel or court employees to channel proceedings to particular judges are stopped promptly. Regrettably, a new cottage industry seems to have emerged, using postfiling motions for recusal or disqualification as a substitute. But it is not the judge shopping or case channeling to which I direct my random thoughts. Rather, I direct my general thoughts to the trust reposed in judicial officers.

Unlike some countries, in the United States we do not have a formalized training system preparing for the variety of jurisprudential and social concerns that attach to becoming a new judge. Donning a robe for the first time was certainly unsettling to me. A contemporaneous flashing thought was that maybe the cynic was correct who first noted that a robe just helps crazy people know where to shoot. But I went forward, with the initial training competently provided by the Federal Judicial Center and armed with the advice of several of my district court and bankruptcy court colleagues that it wouldn't be nearly so difficult as I anticipated. The Judicial Center's continuing training has helped me gain a sense of becoming more at ease with dealing with counsel arising to state "I object" or similarly posing difficulties of greater or lesser complexity that a judge has to deal with on the spot. I have learned to be much more confident in making bench decisions rather than reserving while I send one of my law clerks scurrying to find reports or texts for my reference.

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[6] See Christopher R. Carton, Comment, *Disqualifying Federal Judges for Bias: A Consideration of the Extra Judicial Bias Limitation for Disqualification Under 28 U.S.C. § 455(a)*, 24 SETON HALL L. REV. 2057, 2058–71, for an excellent review of the history of §§ 144 and 455.

[7] Liteky v. United States, 114 S. Ct. 1147, 1157 (1994).

[8] *See, e.g.*, OHIO REV. CODE ANN. § 2701.03 (Anderson 1993).

Thus, I had some reasonable amount of preparation for encountering the problems I'd face while sitting on the dais in my robe in front of a large copy of the Great Seal of the United States of America. What I was not prepared for was the social impact that attends leaving my former law firm on a Friday and on Monday becoming a judge of the United States Bankruptcy Court. I have to keep reminding myself that after all I asked for the appointment—it did not seek me out. I dare say that most of my friends and acquaintances would characterize me as gregarious and a person with a self-deprecating, almost insouciant sense of humor. I very early was reminded that having lunch even on an unplanned basis with attorneys or with local bankers, businessmen, union officials and others who appear or whose interests are regularly before me would contribute to an erosion of confidence in my impartiality. After some nine years on the bench I still have not become accustomed to eating lunch by myself, avoiding the annual local bar association golf outings and other social occasions and in general becoming a great deal more reclusive than I ever anticipated. I regret that some persons seem to get a wrong message from my saying no thanks to their offer to treat me to lunch, to let me use their tickets for sporting or other events, or to include my wife and me in an evening out. I have become much more at ease in telling people up front that I would be delighted to join them at my own expense and where I cannot, to tell them that I hope they will understand that it is otherwise inappropriate.

I don't always render a decision by reaching into a law book to find the answer. Often times I have to reach into myself for resolution of a contested issue. I don't always like what legislative bodies have said, in the context of a particular fact situation. But it is too cynical of me to adopt the old saw that every person's life, liberty and property are in jeopardy while the legislature (or Congress) is in session. There certainly have been times when I've had to swallow hard while holding my nose to announce a decision which I sincerely felt wasn't right, even though I knew without question it was what a statute or rule of law mandated under the circumstances.

I was likewise unprepared for the financial impact of leaving the private practice of law. Don't get me wrong, judges of the courts of the United States are not reduced to poverty. I recognized when one of my children bumped the top of the college admission aptitude tests that she would not be going to one of the very prestigious schools to which her demonstrated aptitude would have permitted her admission. No, I explained to her that she needed to find the very best public-supported institution—one with which she would be comfortable—and to settle for that. We discontinued private club memberships and have resolved ourselves to forget keeping up with increases in the cost of living.

A number of my colleagues found themselves unwilling or unable to accept the demands of the judicial monastery or of very specific limits on income

potential. A recent American Bar Association Journal article recounts the dilemma faced by now former United States Bankruptcy Judge R. Guy Cole.[9] His experience certainly mirrors that of many qualified and dedicated judges who find themselves ill prepared for the social and financial constraints which often follow achieving a lifelong dream of ascending to judicial office.

It is too simple and perhaps unfair to judge a new judge (or even an experienced one, for that matter) based on the extent of their former law practice; former employment as a staff attorney for a business enterprise, labor or eleemosynary organization; or their former position as a public official or employee. Each of us is a conglomeration of education, experience, values and judgments constituting the sum total of our pre-judicial experience. We are each like Ulysses: a part of all he has met.

But, who is crying? The point of all this is to make a modest proposal to judge judges on the content of their character and their demonstrated dedication to equal justice under law. Don't assume that a judge talking on the street to an attorney who may currently have a case in his court is talking about that case. Be resolute in defending an independent judiciary to your clients. Above all, don't take the easy way out of explaining an unfavorable decision by telling your client how, of course, the judge's former law partner or client had the case won from the start. Fortunately every judge I know would confess some fallibility laced with an overriding promise that he or she calls them straight down the middle. Don't be so quick to seek tactical advantage in filing a motion of recusal or disqualification merely to try to get a judge who may be more to your liking. Assume, rather, that we take our oath of office seriously and will equally judge persons who come before us—that we will be fair and impartial. I (and I suspect many of my fellow judges) know we are not *the court* but rather the temporary residents in the seat of the court. I won't be here forever, but while I'm here you can bet I'm going to do the job I promised to do. Finally, keep in mind there is an established procedure for dealing with valid questions of bias or prejudice and you really can move a judge off a case he or she shouldn't be on. Judge us on what we are and not on how you'd like to find us. The end result is the public perception of what courts stand for is strengthened. Our profession and the legal system benefit thereby.

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[9] Barbara L. Morgenstern, *An Uncomfortable Decision*, A.B.A. J., July 1994, at 60.